

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BRIAN KEITH WRIGHT,
Plaintiff,

v.

CHRISTOPHER McPEAK, et al.,
Defendants.

Case No. 2:22-cv-01406-RFB-EJY

Report and Recommendation
Re: EFC Nos. 1-1, 8

I. BACKGROUND

Pending before the Court is Plaintiff's Civil Rights Complaint. ECF No. 1-1. No application to proceed *in forma pauperis* was filed.¹ The filing fee for commencing a civil action was not paid. However, because all but one of Plaintiff's claims is asserted against immune Defendants, the Court recommends dismissing this case with leave to amend only one claim. The Court further recommends denying as moot Plaintiff's pending Motion Requesting District Court to Adhere to F.R.A.P. and Notice of Denial of Access to the Court. ECF No. 8.

II. DISCUSSION

To the extent Plaintiff challenges the actions of or requests relief based on alleged wrongdoing by District Judges or the Clerk of Court for the District of Nevada, he cannot attain relief. "Judges are immune from damage actions for judicial acts taken within the jurisdiction of their courts." *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). "Judicial immunity applies however erroneous the judicial acts may have been, and however injurious in their consequences they may have proved to the plaintiff." *Id.* Therefore, Plaintiff's claims against the District Judges sitting in District of Nevada must be dismissed. Similarly, any relief sought from the Clerk of Court for the District of Nevada is also barred. "[Clerks of Court] have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that an integral part of the judicial process." *Mullis v. U.S. Bankruptcy Court for the Dist. Of Nevada*, 828 F.2d 1385, 1390 (9th Cir.

¹ Because no *in forma pauperis* application was filed, screening under 28 U.S.C. § 1915A is not required.

1 1987). A review of Plaintiff's claims against the Clerk of Court demonstrate they fail as a matter of
 2 law.

3 With respect to Plaintiff's claims against Assistant U.S. Attorneys Ahmed, Frayn, Michael,
 4 and Silva,² these claims also fail. *Kalina v. Fletcher*, 522 U.S. 118, 123-24 (1997); *Buckley v.*
 5 *Fitzsimmons*, 509 U.S. 259, 269-70 (1993); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 912 (9th
 6 Cir. 2012) ("Prosecutors performing their official prosecutorial functions are entitled to absolute
 7 immunity against constitutional torts."). With respect to court-appointed counsel Telia Williams and
 8 attorney Alyssa Bell, who the Court believes is either retained or court-appointed, neither is subject
 9 to suit under 42 U.S.C. § 1983. *Polk County v. Dodson*, 454 U.S. 312, 319-22 (1981). To the extent
 10 Ms. Bell may be retained through the Federal Public Defender she is also immune because she is part
 11 of the federal judiciary and entitled to sovereign immunity which has not been waived. *Ellsworth v.*
 12 *Wallace*, Case No. 05-cv-524-JHP-PJC, 2005 WL 2978926, at *4 (N.D. Okla. Nov. 7, 2005). Thus,
 13 Plaintiff's claims against Ms. Ahmed, Ms. Michael, Ms. Silva, Ms. Williams, and Ms. Bell fail as a
 14 matter of law and should be dismissed with prejudice.

15 Plaintiff's claims against U.S. Probation Officer Shawn Mummy appear to allege a Fourth
 16 Amendment violation arising from a warrant to search Plaintiff's residence based on information
 17 regarding Plaintiff's supposed violations of supervised release. ECF No. 1-1 at 7-8. However,
 18 immunity extends to all persons whose functions are closely associated with the judicial process. *See*
 19 *e.g., Burns v. Reed*, 500 U.S. 478, 492 (1991); *Demoran v. Witt*, 781 F.2d 155, 157 (9th Cir. 1985)
 20 (absolute immunity for probation officers acting in a role closely associated with the judicial process).
 21 Thus, Plaintiff's claims against Probation Officer Mummy fail as a matter of law and should be
 22 dismissed with prejudice.

23 Finally, Plaintiff's Fourth Amendment claim against F.B.I. Special Agent Christopher McPeak
 24 (sometimes "McPeak") must be brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau*
 25 *of Narcotics*, 403 U.S. 388 (1971). Plaintiff asserts lack of reasonable suspicion on the part of
 26 McPeak when he executed a search warrant on a residence affiliated with Plaintiff. ECF No. 1-1 at

28 ² Plaintiff appears to bring a claim against now District Judge Christina Silva. Judge Silva was an Assistant U.S. Attorney before joining the bench.

1 8. Plaintiff also states that owing to his purported violation of supervised release, McPeak arrested
2 Plaintiff based on allegations in an arrest warrant that were either not proven or fabricated by McPeak
3 and Mummy. *Id.*

4 A complaint “sufficiently sets forth the elements of a *Bivens* claim by alleging a violation of
5 ... constitutional rights by agents acting under the color of federal law.” *Morgan v. United States*,
6 323 F.3d 776, 780 (9th Cir. 2003). In *Bivens*, the Supreme Court recognized that an implied private
7 cause of action arises when law enforcement officials violate a plaintiff’s Fourth Amendment right
8 by executing a warrantless search of a plaintiff’s home. *Bivens*, 403 U.S. at 391. Since the *Bivens*
9 decision, the Supreme Court has consistently refused to expand the scope of *Bivens* and the type of
10 fact patterns that could create such implied private causes of action. *See Ashcroft v. Iqbal*, 556 U.S.
11 662, 675 (2009) (holding that the judicial extension of implied causes of action under *Bivens* is
12 disfavored).

13 The Supreme Court has specified a test for cases in which the allegations do not align with the
14 fact pattern in *Bivens*: “If the case is different in a meaningful way from previous *Bivens* cases
15 decided by this Court, then the context is new A case might differ in a meaningful way because
16 of the rank of the officers involved; the constitutional right at issue; the generality or specificity of
17 the official action; the extent of judicial guidance as to how an officer should respond to the problem
18 or emergency to be confronted; the statutory or other legal mandate under which the officer was
19 operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or
20 the presence of potential special factors that previous *Bivens* cases did not consider.” *Ziglar v.*
21 *Abbasi*, -- U.S. --, 137 S. Ct. 1843, 1859-60 (2017). If there is a case whose facts diverge from
22 *Bivens* in a meaningful way, then a two-prong test is used to determine if the plaintiff may bring an
23 action against the federal official under a *Bivens* extension. *Mirmehdi v. U.S.*, 689 F.3d 975, 982
24 (9th Cir. 2012). First, is there an alternative process that can be used to protect the plaintiff’s
25 interests? If yes, then the inquiry stops; if no, proceed to the next question. *Id.* Second, are there
26 reasons to hesitate in allowing such a claim to proceed? *Id.*

27 The Court finds that even if Plaintiff has potential *Bivens* claims against Special Agent
28 McPeak, he has not pleaded facts sufficient under Federal Rule of Civil Procedure 8 to state such

1 claims. While Rule 8 does not require detailed factual allegations, the Rule demands more than
2 “labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Iqbal*, 556
3 U.S. at 678 (citation omitted). “Factual allegations must be enough to raise a right of relief above the
4 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, to state a claim
5 that can survive a motion to dismiss, the complaint must allege sufficient facts to “state a claim to
6 relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation omitted). A complaint may also
7 be dismissed as frivolous if it is premised on a nonexistent legal interest or delusional factual scenario.
8 *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).

9 Here, Plaintiff makes various conclusory statements concerning the circumstances leading to
10 his arrest based on a violation of supervised release. The statements, however, are in part
11 indecipherable and, in any event, conclusory. Conclusory allegations are insufficient to state a
12 recognized *Bivens* claim let alone whether the facts diverge from *Bivens* in a meaningful way, which
13 therefore deserves analysis under *Ziglar*. *Twombly*, 550 U.S. at 565, n. 10. For this reason, the Court
14 recommends Plaintiff’s claim against Special Agent McPeak be dismissed without prejudice with
15 leave to amend.

16 **III. RECOMMENDATION**

17 IT IS HEREBY RECOMMENDED that Plaintiff’s claims against Defendants Judges Dorsey,
18 Gordon, and Ferenbach; the Clerk of Court for the District of Nevada; Assistant U.S. Attorneys
19 Ahmed, Frayn, Michael, and Silva; attorneys Telia Williams and Alyssa Bell; and U.S. Probation
20 Officer Shawn Mummy be dismissed with prejudice.

21 IT IS FURTHER RECOMMENDED that Plaintiff’s claim against Special Agent Christopher
22 McPeak be dismissed without prejudice, with leave to amend.

23 IT IS FURTHER RECOMMENDED that if Plaintiff chooses to file an amended complaint, he
24 must do so by or before **November 30, 2022**. The amended complaint must be titled “FIRST
25 AMENDED COMPLAINT” and must allege sufficient facts regarding claims against Special Agent
26 McPeak to state a *Bivens* claim or to identify why this action should proceed based on special factors
27 previous *Bivens* cases have not considered. Plaintiff is advised that the amended complaint must be
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1 complete in and of itself. Plaintiff must identify all defendants and allege all facts and all causes he
2 asks the Court to review.

3 IT IS FURTHER RECOMMENDED that at the same time Plaintiff files an amended
4 complaint, Plaintiff **must** file either a complete *in forma pauperis* application on the Court's approved
5 form or pay the \$402 filing fee.

6 IT IS FURTHER RECOMMENDED that if Plaintiff fails to file a complete *in forma pauperis*
7 application or pay the filing fee and/or a first amended complaint by or before **November 30, 2022**,
8 the Court issue an Order to Show Cause why this matter should not be dismissed.

9 IT IS FURTHER RECOMMENDED that the Clerk of the Court send Plaintiff the approved form
10 application to proceed *in forma pauperis* by an inmate, as well as the document entitled information
11 and instructions for filing an *in forma pauperis* application.

12 IT IS FURTHER RECOMMENDED that Plaintiff's Motion Requesting District Court to
13 Adhere to F.R.A.P. and Notice of Denial of Access to the Court (ECF No. 8) be DENIED.

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15 Dated this 26th day of October, 2022.

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17 
18 ELAYNA J. YOUCHAK
19 UNITED STATES MAGISTRATE JUDGE

20 **NOTICE**

21 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be
22 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has
23 held that the courts of appeal may determine that an appeal has been waived due to the failure to file
24 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also
25 held that (1) failure to file objections within the specified time and (2) failure to properly address
26 and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal
27 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.
28 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).